

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

DENISE A. GILL,  
Appellant,  
  
v.  
  
DEPARTMENT OF THE NAVY,  
Agency.

DOCKET NUMBER  
PH07528610129

DATE: JUL 8 1987

Denise A. Gill, Philadelphia, Pennsylvania, pro se.

Margaret A. Shetz, Philadelphia, Pennsylvania, for the  
agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman  
Dennis M. Devaney, Member

Member Devaney issues a dissenting opinion.

OPINION AND ORDER

The agency petitions for review of the initial decision, issued March 21, 1986, which reversed the agency's action removing appellant from her position. For the reasons discussed below, the Board GRANTS the agency's petition under 5 U.S.C. § 7701(e), REVERSES the initial decision, and SUSTAINS appellant's removal.

### BACKGROUND

The agency removed appellant from her position as a Warehouse Worker with the Naval Publications and Forms Center on November 29, 1985, based on excessive unauthorized absence for the periods of May 20 through June 7, 1985, June 11 through August 16, 1985, and September 9 through October 4, 1985. The agency based its action on appellant's failure to provide medical justification for her absences.

On appeal to the Board's Philadelphia Regional Office, the administrative judge reversed the agency's action, finding that the agency failed to prove by preponderant evidence that appellant was absent without leave (AWOL) during the periods in question.

### ANALYSIS

The administrative judge found that the agency failed to prove its charge against appellant because of the absence of anything in the record to show that she was actually carried in an AWOL status. Specifically, the administrative judge found that there were no time and attendance records, and that the notice of proposed removal could not constitute evidence in support of the charge. The administrative judge also found that the agency failed to prove that it properly denied leave when appellant requested it. In its petition for review, the agency argues that appellant never requested

leave during the periods of her absence and that the record supports the AWOL charge.

We agree with the agency on both points. Nothing in the record indicates that appellant ever submitted forms requesting leave for the periods of her absence. In fact, appellant does not assert that she did. Nor does the record reflect that she submitted appropriate medical documentation to support her absences. Thus, the administrative judge erred by relying on those cases where the employee prevailed because the agency did not show that it reasonably denied leave which had been properly requested. See Initial Decision at 2-3.

As to the sufficiency of the agency's evidence, notwithstanding the absence of time and attendance cards, the record reflects that the agency considered appellant to be AWOL, see Agency File, Tabs 6, 7, and 9, and that appellant never questioned the nature of the charges against her. Under these circumstances, the administrative judge's concern with documentary evidence of the agency's clerical recordation of appellant's AWOL status is a matter of form over substance. See *Cusick v. Department of the Army*, 12 M.S.P.R. 161, 163 (1982). The agency's failure to submit time and attendance cards did not prejudice appellant's ability to defend herself against the charge and is not germane to a determination of the propriety of that charge.

In refusing to consider as evidence the notice of charges against appellant, the administrative judge relied on the Board's holding in *Trachy v. Defense Communications Agency*, 18 M.S.P.R. 317, 323 (1983), that the notice of proposed removal is tantamount to an indictment and does not constitute evidence of the charge. This has been the Board's position in the past. See *Long v. Department of the Army*, 24 M.S.P.R. 174, 176 n.1 (1984); *McDonald v. U.S. Postal Service*, 20 M.S.P.R. 587, 588 (1984); *Anderson v. Department of Defense, Dependent Schools*, 3 M.S.P.R. 553, 555 (1980); *Powell v. Department of Interior*, 2 M.S.P.R. 513, 516 (1980).

However, in *DePauw v. U.S.I.T.C.*, 782 F.2d 1564 (Fed. Cir. 1986), cert. denied, \_\_\_ U.S. \_\_\_, 107 S.Ct. 69, 93 L.Ed.2d 27 (1986), the court held that, under certain circumstances, a proposal notice can constitute valid proof of an agency's charges.<sup>1</sup> The court stated that where the letter of charges is not merely conclusory, but sets forth in great factual detail the employee's errors and deficiencies, and where the notice is corroborated by other evidence, the letter of charges may be considered as forming

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<sup>1</sup> This case came before the court as the result of an appeal from an arbitrator's decision. The court indicated that, under *Cornelius v. Nutt*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2882, 86 L.Ed.2d 515 (1985), the arbitrator was required to apply the same substantive rules that the Board would apply, and that, therefore, the court would gauge his decision by the same standards as if the case had come from the Board. See *Depauw v. U.S.I.T.C.*, 782 F.2d 1564, 1565 n.2 (Fed. Cir. 1986), cert. denied, \_\_\_ U.S. \_\_\_, 107 S.Ct. 69, 93 L.Ed.2d 27 (1986).

part of the agency's valid proof. *Id.* In this case, the notice of proposed removal set forth in detail the dates of appellant's absences and gave a chronology of all written and oral communications between appellant and the agency. See Agency File, Tab 11. Moreover, the notice of charges was supported by memoranda from the agency to appellant, reflecting that she was considered to be AWOL. See Agency File, Tabs 7 and 9. Thus, the administrative judge erred in giving no probative value to the proposal notice. To the extent that *Trachy* and its line of cases may be read to operate as an absolute bar against considering a proposal notice of evidence of the charges contained therein, those cases are modified in accordance with *Depauw*.

Under the circumstances of this case, we find that the agency has shown by a preponderance of the evidence that appellant was AWOL during the periods cited, and that her removal on that basis was for such cause as would promote the efficiency of the service. See *Conte v. Department of the Treasury*, 10 M.S.P.R. 346, 348 (1982), *aff'd*, 707 F.2d 517 (9th Cir. 1983).<sup>2</sup>

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<sup>2</sup> The agency also contends that the administrative judge exceeded the scope of the requested remedy by ordering that appellant be restored to duty. In light of our decision reversing the initial decision, we need not address this contention.

ORDER


This is the final order of the Merit Systems Protection Board in this appeal. 51 Fed. Reg. 25,157 (1986) (to be consolidated at 5 C.F.R. § 1201.113(c)).<sup>3</sup>

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board

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<sup>3</sup> On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

OPINION OF BOARD MEMBER DENNIS M. DEVANEY

DISSENTING FROM THE OPINION AND ORDER

This case comes before the Board on the agency's petition for review. The initial decision reversed the removal action finding that the agency had failed to support the AWOL charges by a preponderance of the evidence. The initial decision was rendered based on the written record.

The majority opinion finds that the AWOL charges are sustained on the basis of the notice of proposed removal, citing *DePauw v. U.S.I.T.C.*, 782 F.2d 1564 (Fed. Cir.), *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 107 S. Ct. 69 (1986).

The Board has consistently held that the notice of proposed removal is comparable to an indictment and is not evidence in an MSPB proceeding. *See, e.g., Long v. Department of Army*, 84 FMSR 5926; 24 M.S.P.R. 174, 176 n.1 (1984); *Trachy v. Defense Communications Agency*, 83 FMSR 5402; 18 M.S.P.R. 317, 323 (1983); *Powell v. Department of Interior*, 80 FMSR 5065; 2 M.S.P.R. 513, 516 (1980). This approach is consistent with due process considerations embodied in 5 C.F.R. § 752.404(b) which require that an agency provide adequate notice of the charges.

The *DePauw* Court held that the notice of proposed removal may be considered as evidence to support the charges where the notice sets forth the charges in great detail<sup>1</sup> and the record contains overwhelming evidence to support the agency's performance-based charges.<sup>2</sup> I believe that due process concerns are raised by the *DePauw* holding. It is not clear that the

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<sup>1</sup> The *DePauw* Court held that: "The letter of charges was not merely conclusory but set forth in great factual detail petitioner's errors and deficiencies; the specifications were so specific that they could be disputed by the petitioner, if he desired to do so." *DePauw v. U.S.I.T.C.*, 782 F.2d 1564, 1567 n.8 (Fed. Cir.), *cert. denied*, 107 S. Ct. 69 (1986).

<sup>2</sup> In *DePauw, supra*, the agency was required to prove its charges by substantial evidence pursuant to 5 U.S.C. § 4303. The Court's opinion is silent concerning whether its conclusion would apply equally to actions taken pursuant to Chapter 75, which requires the higher preponderance standard.

*DePauw* Court had the benefit of the prior Board decisions in this area because that case arose from an arbitrator's decision. The opinion itself is silent. Assuming *arguendo*, that *DePauw* is controlling precedent, I believe that the majority opinion here represents a substantial extension of *DePauw*. I do not believe that *DePauw* holds that a naked and insufficient proposal letter is enough to sustain the elements of agency charges.

The record here demonstrates that the agency has not proven its charges. The October 4, 1985 proposal letter does not contain the type of detail and specificity concerning the elements of the AWOL charges that were considered essential by the *DePauw* Court. As noted in the initial decision, the letter does not specify the dates and times of the alleged absences, or appellant's regular tour of duty. Furthermore, there is no evidence concerning the rationale upon which the agency denied appellant's leave requests.<sup>3</sup> Appellant has alleged that she should have been carried in a leave status. It is incumbent upon the agency to show that its decision to deny leave was appropriate. *E.g., Wells v. Department of Health and Human Services*, 85 FMSR 5474; 29 M.S.P.R. 346, 348 (1985).

In my view, the agency has failed to present sufficient evidence to justify its charge that appellant was properly carried as AWOL during the relevant period. Such a failure requires that the Board reverse the removal action, since the agency has the burden of proof.

I respectfully dissent.

JUL 8 1987

Date



Dennis M. Devaney  
Member

Washington, D.C.

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<sup>3</sup> It is apparent from the documents in the file that during the relevant period appellant was hospitalized at least twice. The first time apparently for a substance abuse problem and the second time under a diagnosis of schizophrenia. Had the agency presented sufficient evidence to sustain the AWOL charges, this record would raise substantial handicap accommodation issues under the Rehabilitation Act of 1973, as amended.